

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Rules and Policies on Foreign  
Participation in the U.S.  
Telecommunications Market

IB Docket No. 97-142

REPLY COMMENTS OF VIATEL, INC.

Viatel, Inc. ("Viatel"), by its attorneys, hereby responds to the initial comments filed in response to the Federal Communications Commission's ("FCC" or "Commission") *Notice of Proposed Rulemaking*, FCC 97-195, released June 4, 1997 in IB Docket No. 97-142 ("Notice"). As discussed below, the comments filed in this proceeding support Viatel's view that the public interest will be best served if the Commission allows U.S. carriers to provide switched services over private lines to foreign countries under a minimum of regulatory restraints.

**I. THE RECORD SUPPORTS ELIMINATION OF THE ECO TEST FOR AUTHORITY TO PROVIDE SWITCHED SERVICES ON PRIVATE LINES TO WTO MEMBER COUNTRIES.**

**A. Continued Application of the ECO Test is Unnecessary and Inappropriate.**

Viatel and other commenters support the Commission's proposal to eliminate compliance with the Effective Competitive Opportunities ("ECO") test as a requirement for the grant of authority to provide switched services on private lines to World Trade Organization ("WTO") Member countries. As Viatel and other commenters note, adoption of the multilateral WTO Basic Telecom Agreement by countries representing 95 percent of

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the world's international traffic makes application of the ECO test unnecessary and inappropriate.<sup>1</sup>

The FCC implemented the ECO test, on a bilateral basis, to prevent the problem of "one-way bypass," *i.e.*, avoidance of settlement payments to U.S. carriers in cases where a foreign carrier may route U.S. inbound international traffic over private lines which are outside the accounting rate regime, while U.S. carriers must make settlement payments for the foreign-bound traffic because they are prohibited from routing U.S. outbound switched traffic over private lines. Various commenters contend that the Commission must continue to require foreign-affiliated carriers to comply with the ECO test.<sup>2</sup> These commenters argue that WTO membership does not ensure that countries will open their markets to competition in a sufficient or timely fashion such that competitive forces can be relied upon to prevent the threat of one-way bypass. They also complain that post-entry safeguards would be insufficient to address the problem.<sup>3</sup> These arguments are grounded in unsupported apprehension regarding negligible short-term impacts and are intended to obscure the point that liberalized grants of authority for these services are the best way to achieve the Commission's long-term objectives.

As discussed further below, one-way bypass has not been proved to be a significant problem. In any event, implementation of the WTO Basic Telecom Agreement will create new opportunities for U.S. carriers to terminate traffic abroad outside of the accounting rates system. This will lead to reduced costs for termination of traffic which in turn will create

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<sup>1</sup> Comments of Frontier Corp. at 3; Comments of Pacific Communications Services Co. Ltd at 3.

<sup>2</sup> Comments of AT&T Corp. at 6, 42; Comments of Worldcom at 3-4.

<sup>3</sup> Comments of AT&T at 2, 36.

downward pressure on settlement rates. As stated by Frontier,<sup>4</sup> this is a "powerful tool" for reduction of the threat of one-way bypass. Opponents cannot justify the loss of these significant market benefits for the sake of their own short-term gain.

More importantly, retention of the ECO test would simply maintain market entry barriers where the WTO Basic Telecom Agreement seeks to eliminate them. To date, the ECO test has created a formidable barrier for the provision of switched services over private lines and is burdensome and costly for both the carriers and the Commission. Continued reliance upon it would undermine the very market benefits the WTO Basic Telecom Agreement is intended to achieve.

Thus, retention of the ECO test or adoption of some other entry requirements because of short-term considerations about bypass would threaten the Commission's longer-term goal of promoting effective competition, as it would discourage the opening of foreign markets to competition. The U.S. took the lead in concluding the WTO Basic Telecom Agreement and it is clear from the comments that other nations expect the U.S. to take the lead in implementing the Agreement as well.<sup>5</sup> If the U.S. retains market entry restrictions or otherwise hesitates in opening its markets to competition, other countries may be less likely to eliminate their barriers to entry, thereby denying to the U.S. public the benefits that competition can bring.

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<sup>4</sup> Comments of Frontier at 4.

<sup>5</sup> Comments of France Telecom ("FT") at 4; Comments of Teléfonos de Mexico, S.A. de C.V. ("Telmex") at 3; Comments of U S West, Inc. at 5.

**B. Elimination of the ECO Test Will Encourage Reductions in Accounting Rates.**

Viatel also argued in its Comments that the FCC should not apply the ECO test to requests for authority to provide switched services over private lines on routes to non-WTO Member countries since the problem of one-way bypass is speculative. This view is shared by Frontier and Sprint, who argue persuasively that the rationale for abandoning the ECO test for non-WTO Member countries is actually greater than the rationale for abandoning the ECO test for WTO countries.

As Frontier notes, the provision of switched services over private lines has helped bring down accounting rates on routes where carriers have been authorized to provide such services. Consequently, it makes more sense to encourage the provision of these services on routes where the destination country has not joined in the WTO Basic Telecom Agreement, since on routes where the foreign country is a WTO Member, competition will work to reduce settlement charges.<sup>6</sup>

Furthermore, as noted by Sprint, a detailed regulatory and competitive analysis of the smaller, more remote, or less developed countries that have typically remained outside of the WTO is likely to be even more frustrating and less productive than the Commission's experiences to date in applying the ECO test to more developed markets. In all likelihood, it will be extremely difficult for carriers and the Commission to obtain adequate information about the regulatory regimes of these countries. These nations are less likely to be interested in entry into the U.S. market and are less likely to be persuaded to open their doors to competition as a result of U.S. policies.<sup>7</sup> The amount of traffic involved, and the potential

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<sup>6</sup> Comments of Frontier at 4.

<sup>7</sup> Comments of Sprint at 5.

settlement impact, is also very small. Thus, it is not at all clear that there is any benefit to be gained from the application of the ECO test in these circumstances.

**II. COMMENTERS CONFIRM THAT CONDITIONING SECTION 214 AUTHORIZATIONS TO PROVIDE SWITCHED SERVICES OVER PRIVATE LINES ON COMPLIANCE WITH BENCHMARK ACCOUNTING RATES IS UNNECESSARY, COUNTERPRODUCTIVE, AND NOT IN ACCORDANCE WITH U.S. OBLIGATIONS UNDER THE GATS.**

Viatel strongly opposes the Commission's proposal to condition the authorizations of carriers to provide switched services over private lines on compliance with benchmark accounting rates. As discussed below, other commenters generally share Viatel's view that the imposition of entry conditions on Section 214 authorizations for switched services over private lines is unnecessary and unwarranted.

**A. Implementation of Benchmark Accounting Rate Conditions Would Result in Greater Market Harm Than Good.**

Other commenters affirm Viatel's belief that conditioning Section 214 authorizations on compliance with benchmark accounting rates is unnecessary and ultimately counterproductive. Viatel noted in its Comments that there is no apparent evidence of one-way bypass or other anticompetitive conduct arising from the provision of switched services using private lines. Furthermore, the likelihood that a carrier could engage in one-way bypass or other anticompetitive conduct through the provision of these services will be extremely remote following implementation of the WTO Basic Telecom Agreement. As Frontier observes in its comments, one-way bypass will be possible after the Agreement has been implemented only for approximately five percent of all international traffic, since

signatories to the WTO Basic Telecom Agreement represent over 95 percent of the global market for basic telecommunications services.<sup>8</sup>

PanAmSat echoes Viatel's comment that the imposition of accounting rate conditions on Section 214 authorizations to provide switched services over private lines hinders the development of the very competition that experience has shown will bring down accounting rates. PanAmSat notes that adoption of accounting rate requirements would effectively give former monopolists in destination markets the power to dictate when U.S. private line carriers could provide switched services, since these foreign carriers would have to consent to lowering accounting rates to the bottom of the benchmarks.<sup>9</sup> PanAmSat also correctly observes that accounting rate conditions could prevent U.S. carriers from "entering into carriage arrangements with competitive carriers overseas at below benchmark rates if the former monopoly carrier in the country still maintained its rates above benchmark levels."<sup>10</sup>

**B. The Record Does Not Support Adoption of Accounting Rate Conditions.**

The arguments advanced by those commenters who support conditioning Section 214 authorizations to provide switched services over private lines on compliance with benchmarks do not withstand scrutiny. Several commenters allege that benchmark settlement rates are necessary to address competitive distortion from one-way bypass.<sup>11</sup> But as previously

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<sup>8</sup> Comments of Frontier at 3. AT&T complains that "only a small number of countries would provide equivalent outbound by-pass opportunities to U.S. carriers in 1998." Comments of AT&T at 37. This argument ignores the amount of traffic carried on these routes.

<sup>9</sup> Comments of PanAmSat Corp. at 6.

<sup>10</sup> *Id.*

<sup>11</sup> Comments of Worldcom at 6; Comments of AT&T at 33-37; Comments of Sprint at 13.

demonstrated, the problem of bypass is speculative and insignificant. Addressing a problem that is unlikely to occur with a mechanism that will, by its terms, thwart competition, is overbroad and unreasonable. The FCC has ample authority to address any problem of anticompetitive behavior arising from the provision of switched services over private lines once evidence of such anticompetitive conduct is present. Certainly such an approach to addressing potential competition problems would better satisfy the requirements of GATS Article VI and the Regulatory Reference Paper that competitive safeguards be reasonable and appropriate measures.

**C. Adoption and Implementation of Accounting Rate Conditions Here Would Be Unlawful and in Violation of U.S. Obligations Under the GATS.**

The Commission recently adopted an order that, once effective, will establish and require compliance with benchmark accounting rates.<sup>12</sup> Although related issues are addressed in the *Benchmark Report and Order*, the question of the Commission's authority to implement the benchmark conditions proposed in this proceeding are still at issue here. As many commenters note, the proposal to establish mandatory benchmark accounting rates raises serious legal and policy concerns.<sup>13</sup> Commenters argue that the FCC lacks the

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<sup>12</sup> See "Commission Adopts International Settlement Rate Benchmarks (IB Docket No. 96-261)," Report No. IN-97-24, released August 7, 1997 ("*Benchmark Report and Order*").

<sup>13</sup> Comments of Cable & Wireless, plc at 7, n.10; Comments of Kokusai Denshin Denwa Co. Ltd. at 9. AT&T's comments repeatedly assert that the Commission must adopt "cost-based" accounting rates, but AT&T never provides "cost-based" rates for any routes, nor does AT&T even establish with any evidence that current accounting rates are above cost. The affidavit of William H. Lehr, AT&T's economist, that AT&T submits to demonstrate how above-cost accounting rates can cause competitive harm to the U.S. market, consists of much theory and very little fact. To establish that accounting rates are above cost, Mr. Lehr cites to the Commission's Notice of Proposed Rulemaking in the *Benchmark Proceeding*. International Settlement Rates, IB Docket No. 96-261, *Notice of Proposed Rulemaking*, FCC 96-484 (Dec. 19, 1996) ("*Benchmark Proceeding*"). But there the Commission relied on AT&T's estimates of its *own* costs to terminate international traffic in the U.S., not on

necessary sovereign and statutory jurisdiction to impose benchmarks, and that the record provides no empirical support for the Commission's proposals. Benchmark accounting rates also raise issues of international comity, since in adopting such rates the FCC would override the regulatory policies of foreign administrations, modify the pricing structures of foreign carriers, and supersede bilateral negotiations between the U.S. and foreign carriers.<sup>14</sup> Furthermore, it is not necessary for the Commission to require compliance with benchmarks in order to bring accounting rates more in line with costs. As the Commission itself has noted, proposals on how best to achieve cost-based accounting rates are currently under consideration at the International Telecommunications Union.<sup>15</sup>

The comments also show widespread recognition that conditioning any Section 214 authorization on compliance with benchmark accounting rates would place the U.S. in violation of its obligations under the GATS.<sup>16</sup> Since only a very limited number of countries currently comply with the proposed benchmarks, requiring compliance with the benchmark ranges as a condition of entry would effectively replace the ECO test, and thus violate the GATS requirements on market access. Furthermore, accounting rate conditions

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record evidence of foreign carrier costs, for its determination that accounting rates are above costs. *See Benchmark Proceeding* at ¶¶ 8, 50-51.

<sup>14</sup> Comments of Telmex at 8.

<sup>15</sup> *See, e.g., Benchmark Proceeding* at ¶¶ 15, 17; *see also* Comments of Telecommunications Authority of Singapore at 3.

<sup>16</sup> Comments of Telefónica Internacional de España, S.A. ("Telefónica Internacional") at 2, 10-11. Telefónica Internacional notes that the proposed condition would block access to the U.S. market for carriers from more than 93 percent of WTO countries and that this result cannot be viewed as consistent with the market opening purposes of the GATS. *Id.* at 10-11.



would violate the GATS requirements on national treatment, since U.S. carriers with control over essential local facilities would not face the same restrictions.<sup>17</sup>

### **III. OTHER ISSUES**

Viatel argued in its Comments that the Commission should not consider the extent of a WTO Member's commitment or its implementation of its commitment in determining whether a particular application to provide switched services using private lines presents competition problems that must be addressed. Other commenters agree with Viatel's assessment.<sup>18</sup> Such consideration would require the FCC to make a detailed inquiry into a Member country's compliance record, a task that would be unduly burdensome for both the Commission and the applicant. As such, consideration of a Member country's level of commitment and record on implementation would be nothing more than an administrative barrier to entry.<sup>19</sup>

The failure of other countries to comply with their commitments under the WTO Basic Telecom Agreement or to implement the Agreement as quickly as the U.S. would like does not relieve the U.S. of its obligation to comply with its own commitments under the GATS.<sup>20</sup> The U.S. has agreed to be bound by the WTO dispute resolution procedures and hence the U.S. can and should use the WTO dispute resolution process as its forum for addressing problems with other WTO Member countries under the WTO Basic Telecom

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<sup>17</sup> Comments of GTE Service Corp. at 21.

<sup>18</sup> Comments of Telefónica Internacional at 3; Comments of NextWave Personal Communications, Inc. at 9; Comments of Sprint at 10.

<sup>19</sup> Comments of Telefónica Internacional at 16.

<sup>20</sup> Comments of NextWave at 10.


Agreement.<sup>21</sup> Commenters who believe that consideration of a Member country's level of commitment or pace of implementation is appropriate fail to recognize that such action may invite countermeasures on the part of foreign governments that would hinder U.S. carriers in their attempts to enter foreign markets. Thus, such consideration would hinder the development of global competition and deny the benefits of such competition to the U.S. public.

#### IV. CONCLUSION

For the reasons stated, the Commission should eliminate the ECO test for applications to provide switched services over private lines, and should refrain from conditioning authorizations to provide these services on compliance with benchmark accounting rates. Allowing U.S. carriers to provide switched services over private lines without restriction will serve the public interest by promoting competition, contributing to market-based incentives for reductions in accounting rates, and lowering international collection charges.

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<sup>21</sup> Comments of Sprint at 30.

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I hereby certify that true and correct copies of the foregoing Reply Comments of Viatel, Inc., were sent this 12th day of August, 1997, via U.S. Mail, postage prepaid, to the following persons:

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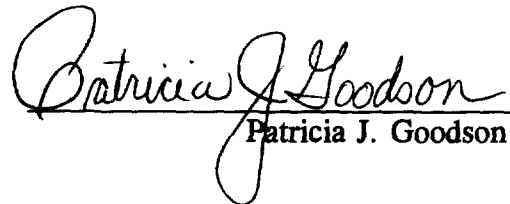
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